Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between January 31, 2015 and September 2, 2015. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

Each summary briefly describes a current circuit split, and is intended to give only the briefest synopsis of the circuit split, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

Preferred citation for the summaries below: *Circuit Splits*, 12 SETON HALL CIR. REV. [n] (2015).

CIVIL MATTERS

CIVIL

ADMINISTRATIVE LAW

Medicare Civil Penalty – Nursing Home Deficiency Reviewability: *Plott Nursing Home v. Burwell,* 779 F.3d 975 (9th Cir. 2015)

The 9th Circuit addressed whether an Administrative Law judge's decision on an appeal of the civil penalties imposed on a nursing home for deficiencies must also review those deficiencies that "are not material to the outcome of the appeal." *Id.* at 986 (internal quotation marks omitted). The court noted that the 6th Circuit determined that in the interest of judicial economy, a judge may "choose to address only those deficiencies that have a material impact on the outcome of the dispute." *Id.* at 989 (internal quotation marks omitted). Oppositely, the 8th Circuit found that due to the possibility of private litigation based on unreviewed deficiencies, "all the adverse findings appealed should be either upheld or reversed." *Id.* (internal quotation marks omitted). The 9th Circuit agreed with the 8th Circuit that all deficiencies "must be reviewed or dismissed" due to the possibility of increased penalties in the future based on unreviewed deficiencies. *Id.* at 988.

Statute of Limitations Individuals with Disabilities Act – Attorneys' Fees: *Meridian Joint Sch. Dist. No. 2 v. D. A.,* 792 F.3d 1054 (9th Cir. 2015*)*

The 9th Circuit addressed the timeliness of suits to recover attorney's fees that are filed subsequent to an administrative dispute. *Id.* at 1061–62. Specifically, the Court addressed which statute of limitations was applicable to suits brought under the Individuals with Disabilities Act (IDEA). *Id.* The Court noted the 6th and 7th Circuits "have characterized attorney's fees requests as ancillary to the dispute and have accordingly borrowed state statutes of limitations for judicial review of administrative agency decision." *Id.* at 1063. Alternatively, the Court noted the 11th Circuit "characterized an attorneys' fee claim . . . as an independent action" and applied the state's standard statute of limitations. *Id*. The Court, relying on past precedent and deferring to the trial court, reasoned that a request for attorney's fees is more akin to an independent claim rather than an ancillary proceeding. *Id.* The Court further supported this distinction by highlighting that an agency's "hearing officer" may not award attorney's fees. *Id*. Thus, the 9th Circuit joined the 6th and 7th Circuits in holding that a claim for attorney's fees under the IDEA is

separate from the initial action filed and thus the statute does not begin to run until the suit for attorneys' fees is brought. *Id.*

BANKING LAW

Truth in Lending Act ("TILA") Rescission Process – Attempt to Unilaterally Rescind Outside of TILA's Three-day Period: *Sanders v. Mt. Am. Credit Union,* 2015 U.S. App. LEXIS 12811 (10th Cir. July 24, 2015)

The 10th Circuit addressed whether unilateral notification of cancellation automatically voids the loan contract or the security interest under TILA. *Id*. at *12. The court noted that the majority of circuits, including the 1st and 7th Circuits, have concluded that the borrower cannot unilaterally rescind their own obligations without also making their lender whole through tender; therefore, the borrower is unable to automatically void the security interest by tendering notice of rescission. *Id*. In contrast, the 11th Circuit concluded that "rescission is 'automatic,' but . . . voiding of a security interest may be judicially conditioned on borrower's tender of amount due." *Id*. *12–13. The 10th Circuit agreed with the majority of circuits, holding that a loan contract is not automatically void by a unilateral notification of cancellation, at least where "the consumer provides notice of an intent to rescind outside of TILA's three-day period. *Id*. at *13.

BANKRUPTCY LAW

11 U.S.C.S. § 105 – Authority of Bankruptcy Court to Use Equitable Powers: *SE Prop.Holdings, LLC v. Seaside Eng'g & Surveying (In re Seaside Eng'g & Surveying),* 780 F.3d 1070 (11th Cir. 2015)

The 11th Circuit addressed "whether a bankruptcy court has the authority to issue a non-debtor release and enjoin a non-consenting party who has participated fully in the bankruptcy proceedings but who has objected to the non-debtor release barring it from making claims against the non-debtor that would undermine the operations of the reorganized entity." *Id*. at 1077. The court noted the 2nd, 3rd, 4th, 6th and 7th Circuits have all held that non-debtor releases and injunctions are "permissible." *Id*. The 5th, 9th and 10th Circuits have declined to allow releases of injunctions against non-debtors. *Id*. at 1077. The 11th Circuit agreed with the 2nd, 3rd, 4th, 6th and 7th Circuits because 11 U.S.C.S. § 105 codifies that bankruptcy courts apply equitable principles. *Id* at 1078. Therefore, the 11th Circuit held bankruptcy courts, utilizing their equitable power, may release non-debtors and enjoin non-consenting parties. *Id*.

Garnishment of Disability Insurance – Mandatory Victims Restitution Act: *United States v. France,* 782 F.3d 820 (7th Cir. 2015)

The 7th Circuit addressed whether a dentist's disability insurance benefits were exempt from garnishment under the Mandatory Victims Restitution Act, 18 U.S.C.S. § 3613 and the Consumer Credit Protection Act. *Id.* at 821. The court noted that the 8th Circuit determined that private disability insurance policies constitute earnings and should be protected. However, the 7th Circuit found that a defendant forfeited this protection where the defendant did not "assert it when first delivered with the citation for discovery of assets." *Id.* at 823. The court disagreed with the 8th Circuit because it "did not address interpretation of the list of exemptions in § 3613(a) and, in fact, failed to even cite that provision." *Id.* at 825. The 7th Circuit stated, "[t]his oversight is critical . . . because in drafting §3613, Congress deliberately included and excluded various kinds of disability income, and the exclusion of private disability cannot be considered an accident or oversight that should be judicially corrected." *Id.* Thus, the 7th Circuit concluded that the government is allowed to garnish from a disability insurance policy to fulfill restitution. *Id.* at 821.

Pension Funds –Trust Fund Contributions: *Bos v. Bd. of Trs.,* 795 F.3d 1006 (9th Cir. 2015)

The 9th Circuit addressed whether they should recognize an exception to the *Cline* rule when determining whether or not unpaid contributions by employers to employee benefit funds are plan assets. *Id.* at 1009. The Court noted that the 11th and the 2nd Circuits determined that documents designating plan assets to include unpaid contributions as establishing fiduciary status for an employer who had authority to make such contributions, while the 10th and 6th Circuits found that an employer cannot be an Employee Retirement Income Security Act ("ERISA") fiduciary with respect to unpaid contributions. *Id.* The 9th Circuit agreed with the 6th and 10th Circuits in finding that an employer never has sufficient control over a plan asset to make it a fiduciary for purposes of § 523(a)(4). *Id*. Thus, the 9th Circuit concluded that an employer's owner was not a fiduciary under ERISA or 11 U.S.C.S. § 523(a)(4) with respect to unpaid contributions to employee benefit funds, and the amount owed therefore could not be held nondischargeable in bankruptcy. *Id*.

Religious Freedom – Compelling Interest: *Listecki v. Official Comm. Of Unsecured Creditors,* 780 F.3d (7th Cir. 2015)

The 7th Circuit addressed whether the Bankruptcy Code ("the Code") constitutes a compelling governmental interest under the Free

Exercise Clause. *Id*. at 745. The court noted that the 8th Circuit found that in general the code does not represent a compelling governmental interest stating, "bankruptcy is not comparable to national security or public safety." *Id*. at 747. However, the 7th Circuit disagreed stating that the 8th Circuit "did not take into account the importance of the code in Supreme Court precedent and our nation's history." *Id*. The court pointed out that "the Code aids those who have reached a certain financial condition and who need assistance" and thus "ensure[s] the financial stability of the citizenry." *Id*. at 746. Thus, the 7th Circuit held that "there is a compelling interest in the code." *Id*.

CIVIL PROCEDURE

Appeals of Dismissals – Standards of Review: *Espinoza v. Dimon,* 797 F.3d 229 (2d Cir. 2015*)*

The 2nd Circuit addressed what standard of review should be used for Federal Rules of Civil Procedure 23.1 dismissals. *Id*. at 231. The Court stated that the approach taken by the 1st and 7th Circuits is to review Rule 23.1 dismissals de novo, "seeing no reason to treat derivative actions differently than any other dismissed case." *Id*. at 235. The Court noted however that the D.C. and 9th Circuits are "bound to abuse-of-discretion review by their precedents," despite having "questioned the wisdom of deferential review in this context." *Id*. The Court stated that "an appellate court performs exactly the same task as when reviewing the dismissal of any other action" when "reviewing the dismissal of a derivative claim." *Id*. The Court then reasoned that although the sufficiency of a complaint's demand allegations depends on a fact-sensitive analysis, that is "not enough to justify deferential review" given that "[m]any other legal questions turn on the specific context of a given case, and yet they remain purely legal questions subject to de novo review." *Id*. at 236. Accordingly, the Court sided with the 1st and 7th Circuits, discarding the deferential standard and holding that "dismissals under Rule 23.1 are reviewed de novo." *Id*.

Judicial Review − § 1252(a)(2)(C): *Garcia v. Lynch,* 2015 U.S. App. LEXIS 14469 (9th Cir. Aug. 18, 2015)

The 9th Circuit addressed whether 8 U.S.C.S. § 1252(a)(2)(C)'s bar on judicial review applies to the denial of a procedural motion such as a motion to continue. *Id.* at *9–10. The court noted that the 7th Circuit and the 5th Circuit held that the statutory language of § 1252(a)(2)(C) strips the court of jurisdiction over all other orders that precede the removal order, whether substantive or procedural in nature. *Id.* However, the 9th

Circuit disagreed with the 7th and 5th Circuits and held that § 1252(a)(2)(C) does not preclude a review of a denial of relief that is based not on the "commission or admission of a crime," but rather on the alien's failure to establish his or her eligibility for the relief sought. *Id.* The court further held that it retains jurisdiction over the removal order challenging the denial of relief on the merits instead of basing its review on a qualifying conviction. *Id.*

Jurisdiction – Choice of Forum; JPMorgan Chase Bank: *N.A. v. Winget,* 602 Fed. Appx. 246 (6th Cir. 2015)

The 6th Circuit addressed whether, in light of the Supreme Court's holding in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the bankruptcy court is the appropriate forum for the delay defense. *Id.* at 259. In *Stern*, the Supreme Court held that an individual's state law counterclaim was independent of federal bankruptcy law, and therefore could not be ruled on in bankruptcy court. *Id.* at 261. The 6th Circuit acknowledged a circuit split regarding the applicability of *Stern*. *Id.* at 261. The 9th Circuit previously held that state law fraudulent transfer claims could not be heard in the bankruptcy court in consideration of *Stern*. *Id.* Conversely, the 5th Circuit held that the bankruptcy court had authority to issue judgment on a creditor's claim because the claim was "inextricably intertwined with the interpretation of a right created by federal bankruptcy law." *Id.* This court agreed with the 5th Circuit, that the holding in *Stern* does not deprive the bankruptcy court of its jurisdiction to consider the delay defense because it is a challenge to the value of bankruptcy assets. *Id.*

Jurisdiction – Yearsley Immunity: *Adkisson v. Jacobs Eng'g Grp., Inc.,* 790 F.3d 641 (6th Cir. 2015)

The 6th Circuit addressed whether "*Yearsley* immunity pose[s] a jurisdictional bar." *Id*. at 646. The court noted that the 4th Circuit has held that the bar is jurisdictional, reasoning that "*Yearsley* derivatively extend[s] sovereign immunity to a private contractor." *Id.* at 646. In contrast, the 5th Circuit held that *Yearsley* immunity is not jurisdictional, reasoning that "*Yearsley* does not discuss sovereign immunity or otherwise address the court's power to hear the case" so "concluding *Yearsley* is applicable does not deny the court of subject-matter jurisdiction." *Id.* at 647 (internal quotation marks omitted). The 6th Circuit agreed with the 5th Circuit holding that "Yearsley is not jurisdictional in nature." *Id.* The court reasoned that "*Yearsley* immunity is . . . closer in nature to qualified immunity for private individuals under government contract, which is an issue to be reviewed on the merits rather than for jurisdiction." *Id.*

Legal standard – District Courts Recalling Jurors After Dismissal: *Dietz v. Bouldin,* 794 F.3d 1093 (9th Cir. 2015)

The 9th Circuit "addressed when a district court abuses its discretion by recalling jurors after dismissing them," and what legal standard governs this analysis. *Id*. at 1096. The court noted that the 2nd, 3rd, 4th, and 7th Circuits have undertaken case-specific analyses and "have recognized that in certain limited circumstances, a district court may recall a jury immediately after dismissal to correct an error in its verdict," or have allowed for recall after dismissal in "situations where the jurors have been released but effectively remained under [the] control of the court." *Id*. at 1097. On the other hand, the court noted that the 8th Circuit "eschewed this case-specific analysis and instead adopted a restrictive bright-line rule prohibiting recall once the jurors have left the confines of the courtroom." *Id*. at 1098. The 9th Circuit agreed with the majority of the circuits, finding that the totality of circumstances analysis "strikes a sensible balance between fairness and economy" if "a proper inquiry into the circumstances [is made] to ensure jurors were not exposed to prejudicial influences during the brief period of dismissal." *Id*. at 1099. The 9th Circuit disagreed with the 8th Circuit as to its rigid rule regarding the courtroom door "[p]recisely because we live in an age of instant electronic communication," making the courtroom door an improper place to draw the line between exposure to outside influences and protection from such influences. *Id*. Thus, the 9th Circuit concluded "that in limited circumstances, a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id*. at 1100.

Maritime Law – In Personam Claims: *United States v. Jantran,* 782 F.3d 1177 (10th Cir. 2015)

The 10th Circuit addressed whether the Government can bring an *in personam* claim against a ship owner or operator under §408 of the Rivers & Harbors Act (the "Act"). *Id.* at 1178. While the Act does not expressly authorize *in personam* claims, it does authorize the Government to proceed *in rem* against any vessel used to violate the Act. *Id.* at 1179. The 5th Circuit, relying on the plain language of the Act, found that § 408 does not authorize *in personam* actions. *Id.* at 1182. Dissimilarly, "the [6th] Circuit allowed an *in personam* recovery against a ship owner under §408." The 6th Circuit relied on the reasoning of a previous case that allowed *in personam* recovery for a different section of the Act. *Id.* at 1181. The 10th Circuit agreed with the 5th Circuit's plain language interpretation of

the Act and held that "the Government may not bring *in personam* actions against vessel owners for violations of § 408 of the Act." *Id.* at 1184.

Prisoner Litigation Reform Act – Prisoner Payment of Filing Fees: *Siluk v. Merwin,* 783 F.3d 421 (3d Cir. 2014)

The 3rd Circuit addressed "whether the Prisoner Litigation Reform Act [28 U.S.C. § 1915] requires recoupment of multiple encumbrances sequentially or simultaneously." *Id.* at 423 (internal quotation marks omitted). Section 1915(b)(2) of the Act requires a prisoner to make monthly payments equal to 20 percent of the[ir] preceding month[s] income." *Id.* The 5th, 7th, 10th, and D.C. Circuits, have held that simultaneous payments should be made when multiple filing fees are owed, therefore requiring a monthly 20 percent deduction for each concurrent case that the prisoner owes filing fees for. *Id.* Contrary, the 2nd and 4th Circuits, have held that sequential payments only require a single "20-percent deduction from [a prisoner's] prison account each month" when the prisoner owes multiple filing fees. *Id.* The 3rd Circuit joined the 2nd and 4th Circuits, finding that sequential payments fulfill Congress's intent to deter frivolous litigation, while not imposing significant burdens on a prisoner. *Id.* at 427.

Removal – Rule of Unanimity: *Griffioen v. Cedar Rapids & Iowa City Ry. Co.,* 785 F.3d 1182 (8th Cir. 2015)

The 8th Circuit addressed "whether a representation in a removing defendant's notice stating that its codefendants consent can satisfy § 1446's unanimity requirement." *Id* at 1187. The court noted that the 4th, 6th, and 9th Circuits have held that "a statement in a defendant's timely removal notice [on behalf of his or her] codefendants [consenting to removal] is sufficient." *Id* at 1186. On the other hand, the 5th and 7th Circuits have suggested that in most situations a defendant cannot give notice of consent on behalf of another defendant. *Id*. The 5th Circuit held that a notice of consent is allowed only by the defendant itself or by someone with authority to act on behalf of the defendant. *Id* at 1187. The court further noted that "[t]he 2011 amendments to § 1446 that codified the rule of unanimity did not describe the form of or time frame for consent when multiple defendants are involved." *Id*. Thus, the 8th Circuit agreed with the 4th, 6th, and 9th Circuits holding that a defendant's timely removal notice showing consent on behalf of codefendants is sufficient. *Id*. at 1188.

Settlements – Offers of Judgment: *Hooks v. Landmark Indus.,* 797 F.3d 309 (5th Cir. 2015)

The 5th Circuit addressed "whether a complete [Federal] Rule [of Civil Procedure] 68 offer of judgment moots an individual's claim." *Id*. at 314. The 5th Circuit noted that the 3rd, 4th, 6th, 7th, 10th, and Federal Circuits "have all held that a complete Rule 68 offer moots an individual's claim" while the 2nd, 9th, and 11th Circuits "have held that an unaccepted Rule 68 offer cannot moot an individual's claim." *Id*. The 5th Circuit stated that "Rule 68 considers an unaccepted offer to be withdrawn" consistent with the "hornbook law that the rejection of an offer nullifies the offer." *Id*. (internal quotation marks omitted). The 5th Circuit then posited that giving "controlling effect" to an unaccepted Rule 68 offer would be "flatly inconsistent" with the Rule. *Id*. Furthermore, the 5th Circuit reasoned that "[a] contrary ruling would serve to allow defendants to unilaterally moot named-plaintiffs' claims in the class action context–even though the plaintiff, having turned the offer down, would receive no actual relief." *Id*. Therefore, the 5th Circuit joined the 3rd, 4th, 6th, 7th, 10th, and Federal Circuits in holding that "an unaccepted offer of judgment to a named plaintiff in a class action is a legal nullity, with no operative effect." *Id*. (internal quotation marks omitted).

CONSTITUTIONAL LAW

Article III Standing – Class Action Lawsuits: *Neale v. Volvo Cars of N. Am., LLC,* 794 F.3d 353 (3d Cir. 2015)

The 3rd Circuit addressed the question of what Article III requires of putative, unnamed class members during a Federal Rules of Civil Procedure Rule 23 motion for class certification, specifically, whether all class members must possess standing. *Id.* at 359–60. The 3rd Circuit noted that the 2nd Circuit has held that while each member of a class need not submit evidence of personal standing, "no class may be certified that contains members lacking Article III standing." *Id*. at 365. The 3rd Circuit reasoned that the 8th Circuit has held "a [state] law that permitted a single injured plaintiff to bring a class action on behalf of a group of uninjured individuals was "inconsistent with the doctrine of standing . . . . [stating a] class must be defined in such a way that anyone within it would have standing." *Id*. at 366. The 3rd Circuit also noted that the D.C. Circuit requires all class members to prove they were in fact injured, but does not require all to prove standing. *Id*. The 3rd Circuit disagreed with its sister circuits, holding that "so long as a named class representative has standing, a class action presents a valid case or controversy under Article III." *Id.* at 369 (internal quotation marks omitted). The 3rd Circuit reasoned that

unnamed class members are generally unknown when a class action suit is filed and are only identified through discovery. *Id.* at 367.

Fifth Amendment – Equal Protection: *Morales-Santana v. Lynch,* 792 F.3d 256 (2d Cir. 2015)

The 2nd Circuit addressed the constitutionality of the Immigration and Nationality Act of 1952, which requires a more difficult standard for citizenship when a child is born outside of the United States to unwed parents where only the father is a United States citizen as compared to when only the mother is a citizen. *Id.* at 258–59. The 9th Circuit noted that the "Government has carried its burden of showing an exceedingly persuasive justification for the statute's gender-based classification as a means of addressing the problem of statelessness," which would not place the statute in violation of the Fifth Amendment. *Id.* at 273 n.17 (internal citations omitted). The 2nd Circuit disagreed with the 9th Circuit because "the Government has not shown that the problem arose – or was perceived to arise – more often with citizen mothers than with citizen fathers of children born out of wedlock abroad." *Id.* Thus, the 2nd Circuit held that a child born outside of the United States to parents out of wedlock where one is a citizen and the other is not, attains citizenship where the citizen parent has spent at least one continuous year inside of the United States prior to the child's birth. *Id.* at 272–73.

Second Amendment – Unauthorized Aliens: *United States v. Meza-Rodriguez,* 798 F.3d 664 (7th Cir. 2015*)*

The 7th Circuit addressed whether the Second Amendment right to bear arms protects unauthorized aliens within the borders of the United States. *Id.* at 669. The court noted that the 4th, 5th, and 8th Circuits determined that the Second Amendment does not protect unauthorized citizens. *Id.* The 7th Circuit recognized that unauthorized aliens enjoy other constitutional rights when they have come within the territory of the United States, and have developed substantial connections with the United States. *Id.* at 670. The 7th Circuit disagreed with the 4th, 5th, and 8th Circuits as the court did not believe that the Second Amendment provides anything special that excludes unauthorized aliens, while other constitutional rights do not exclude them. *Id.* at 671. Thus, the 7th Circuit concluded that the Second Amendment right to bear arms does not exclude unauthorized aliens. *Id.*

COPYRIGHT LAW

Federal Preemption – Federal Copyright Protection: *Spear Mktg. v. BancorpSouth Bank,* 791 F.3d 586 (5th Cir. 2015*)*

The 5th Circuit addressed whether state law claims based on ideas fixed in tangible media are preempted by the Copyright Act, 17 U.S.C. § 301(a). *Id.* at 597. The 5th Circuit specifically examined whether preemption "extends to all works satisfying the requirements of [the statute], even those that also contain noncopyrightable material." *Id.* at 594. The court noted that the 2nd, 4th, 6th and 7th Circuits determined that "for the purpose of preemption under § 301(a), ideas fixed in tangible media fall within the subject matter of copyright." *Id.* at 596. Oppositely, the 11th Circuit held "[i]deas are substantively ineligible for copyright protection and, therefore, are categorically excluded from the subject matter of copyright even if expressed in a tangible medium." *Id.* (internal citations omitted). The 5th Circuit held with the majority of circuits reasoning that it was Congress' intention for the "Copyright Act to protect some expressions but not others," furthermore, Congress "wrote § 301(a) to ensure that the states did not undo this decision." *Id*. Therefore, the 5th Circuit held that "state law claims based on ideas fixed in tangible media are preempted by § 301(a). *Id.* at 597.

EMPLOYMENT LAW

Employee Retirement Income Security Act (ERISA) – 29 USC § 1113: *Fulghum v. Embarq Corp.,* 785 F.3d 395 (10th Cir. 2015)

The 10th Circuit addressed an ambiguity in a provision of the statute of limitations for filing for a breach of fiduciary duty where the ambiguous language at issue stated: "providing that in the case of fraud or concealment, a civil enforcement action may be commenced not later than six years after the date of discovery of [the] breach or violation." *Id*. at 413 (internal quotation marks omitted). The 10th Circuit noted that the 1st, 3rd, 7th, 8th, 9th and D.C. Circuits determined that the "fraud or concealment" provision applies only when a fiduciary conceals the alleged breach. The 10th Circuit also noted that the 2nd Circuit found the provision applicable when a plaintiff's breach of fiduciary duty claim is based on fraud, where the defendant had acted to conceal its breach. *Id*. at 414. The 10th Circuit took a novel position on the issue, concluding that the provision is an exception to the general statute of limitations, and applies "when the alleged breach of fiduciary duty involves a claim the defendant made a false representation of a matter of fact, whether by words of conduct, by false or misleading allegations or by concealment of that

which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury or when the defendant conceals the alleged breach of fiduciary duty." *Id*. at 415 (internal quotation marks omitted).

False Claims Act – Scope: *United States v. Sanford-Brown, Ltd.,* 788 F.3d 696 (7th Cir. 2015)

The 7th Circuit addressed whether consequences under the Federal Claims Act ("FCA") are triggered for violating Title IV Restrictions after good faith entry into a program participation agreement ("PPA"). *Id*. at 711. The 7th Circuit noted that the 9th Circuit determined that a PPA conditions the initial and continued participation of an eligible institution upon compliance with Title IV of the Higher Education Act, while the 8th Circuit found violations of Title IV Restrictions after good faith entry into Title IV do not trigger FCA liability. *Id.* at 710. The 7th Circuit agreed with the 8th Circuit finding good-faith entry into a PPA as the condition of payment necessary to be eligible under the subsidies program, and absent evidence of fraud before entry, non-performance after entry into an agreement for government subsidies does not impose liability under the FCA. *Id.* The 7th Circuit disagreed with the 9th Circuit, because adopting the 9th Circuit's position would mean that any conditions in a PPA that are not met could impose strict liability under the FCA, leading to untenable results. *Id.* at 711. Thus, the 7th Circuit concluded FCA consequences are not triggered where a violation of Title IV Restrictions occurs after good-faith entry into a PPA. *Id.* at 710–11.

Retaliatory Discrimination – McDonnell Douglas Legal Standard: *Foster v. Univ. of Maryland-Eastern Shore,* 787 F.3d 243 (4th Cir. 2015)

The 4th Circuit addressed whether *University of Texas Southwestern Medical Center v. Nassar,* 133 S. Ct. 2517 (2013) had "any bearing on the causation prong of the prima facie case" of employment retaliatory discrimination. *Id.* at 251. The court noted that the 6th and 11th Circuits "require evidence of but-for causation in order to establish a prima facie case;" while the 2nd, 5th, 6th, and 11th Circuits "have held, either expressly or implicitly, that *Nassar* did not alter the elements of a prima facie case." *Id.* at 252 n.10. The 4th Circuit disagreed with the 6th and 11th Circuits because "adopting the contrary rule (and applying the ultimate causation standard at the prima facie stage) would be tantamount to eliminating the McDonnell Douglas framework in retaliation cases by restricting the use of pretext evidence to those plaintiffs who do not need it." *Id.* at 251. Thus, the 4th Circuit concluded "that *Nassar* does not alter the causation prong of a prima facie case of retaliation." *Id.*

Statutory Interpretation – Fair Labor Standards Act: *Greathouse v. JHS Sec. Inc.,* 784 F.3d 105 (2nd Cir. 2015)

The 2nd Circuit addressed whether an employee pursuing a claim for unlawful retaliation must do more than voice an equal pay complaint to a supervisor to invoke the Equal Pay Act of 1963 ("EPA") § 215(a)(3)'s protections. *Id.* at 110. The 2nd Circuit noted that the 1st, 4th, 5th, 7th, 8th, 9th, 10th, and 11th Circuits have determined that section 215(a)(3) protects employees from retaliation for their complaints made to employers, while the 6th Circuit found that complaints to an employer are covered by section 215(a)(3). *Id.* The 2nd Circuit agreed with the [1st, 4th, 5th, 7th, 8th, 9th, 10th, and 11th] Circuits, finding that section 215(a)(3) prohibits retaliation against employees who orally complain to their employers, so long as their complaint is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Id.* at 117.

IMMIGRATION LAW

Illegal Aliens Disputes – Notice Entitlement from the Immigration Court: *Gaye v. Lynch,* 788 F.3d 519 (6th Cir. 2015)

The 6th Circuit addressed whether the Immigration and Nationality Act of 1952 (INA) or its amended version, the REAL ID Act, entitles the asylum seeker to notice of what type of corroborating evidence is required of him. *Id.* at 529. The 7th Circuit has held that entitling notice "would create the result that a petitioner must receive additional notice from the [immigration judge] and then an additional opportunity to provide corroborative evidence before an adverse ruling, [and thus] necessitate two hearings." *Id.* (internal quotation marks omitted). Oppositely, the 9th Circuit has held "not only that an alien is entitled to such notice, but indeed that the REAL ID Act unambiguously requires such notice." *Id.* The 6th Circuit agreed with the 7th Circuit holding that, "the INA – either the version that governed in 2001 or as amended by the REAL ID Act – does not entitle him to any such notice." *Id*. The 6th Circuit reasoned that the text of the INA "does not suggest that the alien is entitled to notice from the [immigration judge] as to what evidence the alien must present." *Id.* at 530.

Post-entry Lawful Permanent Resident – Waiver of Inadmissibility: *Medina-Rosales v. Holder,* 778 F.3d 1140 (10th Cir. 2015)

The 10th Circuit addressed whether "Lawful Permanent Residents ("LPR") who acquire that status after living in the United States and who

later are convicted of an aggravated felony are eligible for consideration for a waiver of inadmissibility under § 1182(h)." *Id.* at 1143. The 10th Circuit noted that the 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, and 11th Circuits determined that the language of § 1182(h) precludes eligibility for a waiver after conviction of an aggravated felony only if the alien received LPR status at the time the alien lawfully entered the United States, but it does not apply to an alien who obtained LPR status after having been present in the United States before acquiring that status. The 8th Circuit disagreed and found that the language of the statute is ambiguous and therefore that any alien convicted of an aggravated felony after becoming an LPR, regardless of when or how that status was acquired, is ineligible for a waiver of inadmissibility. *Id.* The 10th Circuit agreed with the majority of circuits and found the plain meaning of the statute's language and the statutory definitions of relevant terms were persuasive. *Id.* The 10th Circuit disagreed with the 8th Circuit's finding that the statutory language was ambiguous, barring all LPR requests for waivers. *Id.* Thus, the 10th Circuit concluded that only persons who obtained LPR status before or when they entered the United States are barred from seeking a waiver under § 1182(h). *Id.* at 1145.

PATENT LAW

Patent Infringement – Collateral Estoppel: *United Access Techs., LLC v. CenturyTel Broadband Servs. LLC,* 778 F.3d 1327 (Fed. Cir. 2015)

The Federal Circuit addressed which Restatement of Judgments should be adopted regarding collateral estoppel when "the decision of the first tribunal rests on alternative grounds[.]" *Id.* at 1333. The First Restatement of Judgments takes the stance collateral estoppel can apply to each alternative ground, while The Second Restatement of Judgments states that no alternative grounds are "entitled to be accorded collateral estoppel effect." *Id*. The Federal Circuit noted the 2nd, 3rd and 9th Circuits have adopted the First Restatement of Judgments, while the 4th, 5th, 7th, and 10th Circuits have adopted the Second Restatement of Judgments. *Id.* The Federal Circuit held that "[i]n a case such as this one, involving general principles of the law of judgments that do not implicate questions within this court's exclusive jurisdiction, [the court] appl[ies] the law of the regional circuit, which in this case is the [3]rd Circuit." *Id.* at 1330 n.1. Thus, the Federal Circuit adopted the First Restatement of Judgments as the 3rd Circuit has. *Id.* at 1333 n.2.

SECURITIES LAW

Interpretation of "alleging" – Securities Litigation Uniform Standards Act of 1998: *Criterium Capital Funds B.V. v. Tremont (Berm.), Ltd. (In re Kingate Mgmt. Litig.),* 784 F.3d 128 (2d Cir. 2015)

The 2nd Circuit addressed when the Securities Litigation Uniform Standards Act's (SLUSA's) ambiguous term "alleging" should be deemed satisfied by a complaint. *Id*. at 146. The 2nd Circuit noted that the 3rd and 6th Circuits' decisions on the issue "may be read to mean that SLUSA's ambiguous term 'alleging' should be deemed satisfied whenever a complaint includes allegations of false conduct (of the sort specified in SLUSA) that is essential to the success of the state law claim, even if that conduct is alleged to have been done by third persons without the defendant's complicity." *Id*. The 2nd Circuit disagreed with the 3rd and 6th Circuits since SLUSA's text, purposes, and history provide no reasonable justification "for construing SLUSA as barring state-law claims that do not depend on conduct by the defendant falling within SLUSA's specifications of conduct prohibited by the anti-falsity provisions of the [Securities Act of 1933 and the Securities Exchange Act of 1934]." *Id*. at 149. The 2nd Circuit created a new standard concluding "that SLUSA's preclusion applies when the state law claim is predicated on conduct of the defendant specified in SLUSA's operative provisions," referencing the 1933 and 1934 Acts' anti-falsity provisions. *Id*.

NATIVE AMERICAN LAW

National Labor Relations Act – Authority & Jurisdiction: *NLRB v. Little River Band of Ottawa Indians Tribal Gov't,* 788 F.3d 537 (6th Cir. 2015)

The 6th Circuit addressed whether a federal statute creating a comprehensive regulatory scheme presumptively applies to Indian tribes. *Id.* at 539. The court noted that the 7th, 8th, and 11th Circuits determined that federal statutes creating a comprehensive regulatory scheme do presumptively apply to Indian tribes, while the 9th Circuit determined that the presumption is limited by some exceptions. *Id*. at 547. The 6th Circuit agreed with the 9th Circuit in finding that a federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: "(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." *Id.* at 548, 549–

50. The court disagreed with the 7th, 8th, and 11th Circuits, finding that these statutes did not automatically apply to Indian tribes. *Id.* at 547, 549–50. Thus, the 6th Circuit concluded that the application of federal statutes to Indian tribes does not always apply. *Id.* at 549–50.

PUBLIC HEALTH & WELFARE LAW

Social Security – Disability Determinations: *Zavalin v. Colvin,* 778 F.3d 842 (9th Cir. 2015)

The 9th Circuit addressed whether an individual's functional capacity may conflict with the ability required of that individual to perform a Level 3 Reasoning job on the Department of Labor's General Education Development scale. *Id*. at 846. The court noted that the 10th Circuit found that a conflict does exist between a claimant's limitation to do "simple and routine work tasks" and the demands of Level 3 Reasoning, while the 7th and 8th Circuits found that no such conflict exists. *Id*. The 9th Circuit joined the 10th Circuit in holding that an individual's limitation to perform simple routine tasks is in conflict with the requirements of Level 3 because "it may be difficult for a person limited to simple, repetitive tasks to follow instructions in diagrammatic form as such instructions can be abstract". *Id*. at 847 (internal quotation marks omitted).

STATUTORY INTERPRETATION

Class Action Suits – Lodestar Method: *Levitt v. Southwest Airlines Co. (In re Southwest Airlines Voucher Litig.*, 799 F.3d 701 (7th Cir. 2015)

The 7th Circuit addressed whether 28 U.S.C. § 1712 allowed a district court to use the lodestar method to calculate the fee award for class council. *Id.* at 707. The court noted that the 9th Circuit determined that subsection (a) of the statute prohibits the use of the lodestar method for coupon settlements that do not provide injunctive relief. *Id.* at *14–15. The 7th Circuit used methods of statutory interpretation, including the canon against surplusage, to determine that the words "attributable to" mean more than just the plain meaning of the words. *Id.* The 7th Circuit disagreed with the 9th Circuit as the 9th Circuit took the plain meaning approach to the words "attributable to," finding that the words only mean "caused by." *Id.* Thus, the 7th Circuit concluded that the words "attributable to" in § 1712(a) have more than just a plain meaning, and therefore a district court could use the lodestar method to calculate attorney fees to compensate class counsel for the coupon relief obtained for the class. *Id.* at 710.

District Court Discretion – False Claims Act: *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457 (5th Cir. 2015)

The 5th Circuit addressed whether 31 U.S.C. § 3730(b)(2), of the False Claims Act (FCA), which requires that a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the government" and must "remain under seal until the court orders it served on the defendant[,]"compels a dismissal of a case if the seal is violated. *Id.* at 470. The 9th Circuit requires district courts to "evaluate three factors[,] [known as the *Lujan* test,] in determining whether dismissal was warranted:1) the harm to the government from the violations; 2) the nature of the violations; and 3) whether the violations were made willfully or in bad faith." *Id.* The 2nd Circuit adopted a similar standard. *Id.* However, the 6th Circuit has held that "any violation of the seal requirement, no matter how trivial, requires dismissal." *Id.* at 471. The 5th Circuit reasoned that the purpose of the FCA was to encourage more private FCA actions and mandating dismissal for trivial violations of § 3730(b)(2) would be contrary to that purpose. *Id.* at 471. Thus, the court joined the 2nd and 9th Circuits in applying the *Lujan* test to determine whether dismissal is appropriate when § 3730(b)(2) is violated. *Id.*

Retirement Plans – Defining Normal Retirement Age: *Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272 (2d Cir. 2015)

The 2nd Circuit addressed whether retirement plan sponsors can define a plan's normal retirement age as "five years of service." *Id.* at 273. The court first noted that the Employee Retirement Income Security Act of 1974 (ERISA) describes an option for the normal retirement age as "the 5th anniversary of the time a plan participant commenced participation in the plan," but only after the participant turns 65 years old. *Id.* at 274. The 7th Circuit said a plan that defined normal retirement age as "five years on the job" did not violate ERISA because "[t]he Plan's formula—the participant's age when beginning work, plus five years—is an 'age'" and because the Plan took the formula from ERISA's definition. *Id.* at 238. The 7th Circuit held that five years on the job is an acceptable, normal retirement age merely because it is an age. *Id.* at 283. The 2nd Circuit disagreed with the 7th Circuit because the 2nd Circuit maintained that a plan's normal retirement age must have a "relationship to the age at which plan participants normally retire because the phrase is used to trigger certain benefits or adjustments." *Id.* at 238. As such, the 2nd Circuit found that the retirement plan at issue was invalid. *Id.* at 285.

CRIMINAL

CRIMINAL PROCEDURE

Administrative Proceedings – Admissibility of Evidence: *Yanez-Marquez v. Lynch*, 789 F.3d 434 (4th Cir. 2015)

The 4th Circuit addressed whether the 'qualified immunity' approach or the 'totality of the circumstances' approach applies "when a violation of the Fourth Amendment is egregious such that it transgresses notions of fundamental fairness." *Id.* at 453. The court noted that the 9th Circuit determined that the qualified immunity approach should be applied, while the 2nd, 3rd, and 8th Circuits found that the totality of circumstances approach should be applied. *Id.* The 4th Circuit agreed with the 2nd, 3rd, and 8th Circuits in finding that the totality of circumstances approach should be applied. *Id.* at 459. The court reasoned that the totality of circumstances approach is a "flexible case-by-case standard, taking into account a variety of factors. It allows the court to examine all of the facts it deems relevant to the egregiousness inquiry and focuses on the unreasonableness of the conduct of the law enforcement officers." *Id.* at 460. The 4th Circuit further noted that an "alien's evidence, in its totality, must support a basis to suppress the challenged evidence under a finding of egregiousness, even at the prima facie case stage. *Id.* The court reasoned that such evidence cannot be based on intuition or speculation, especially as it relates to the intent of law enforcement officers. *Id.* The 4th Circuit noted that suppression hearings should be the exception, not the rule in removal proceedings, so the alien's evidentiary burden, even at the prima facie case stage, is high." *Id.* at 461 (internal citations omitted). The 4th Circuit disagreed with the 9th Circuit as the qualified immunity approach "requires a suppression hearing any time an alien alleges that the law enforcement officers acted in bad faith . . . [which] sets the evidentiary proffer bar too low." *Id.* at 459. Thus, the 4th Circuit held that the totality of the circumstances approach applies when assessing the egregiousness of a Fourth Amendment violation. *Id.*

Criminal Sentencing – Appellate Review: *United States v. Doe*, 2015 U.S. App. LEXIS 15578 (3d Cir. Sept. 2, 2015)

The 3rd Circuit addressed whether a *Begay* error, the mischaracterization of a crime or offense that results in a sentence enhancement, is debatably constitutional and therefore cognizable for collateral review under 28 U.S.C. § 2253(c)(2). *Id.* at *24. The 4th Circuit stated that "it [was] at least debatable that [the] erroneous application of

the career offender enhancement deprives [a defendant] of his liberty in violation of his due process rights." *Id*. at *23. The 8th Circuit, however, held that a "*Begay* claim, far from being constitutional, was not even cognizable in a § 2255 case." *Id*. The 3rd Circuit agreed with the 4th Circuit, and found the error at least debatably constitutional. The court held "that the claim is cognizable, at least in cases arising under the mandatory Guidelines." *Id*. at *57.

Deportation – Sentencing Enhancements: *United States v. Kosmes*, 792 F.3d 973 (8th Cir. 2015)

The 8th Circuit addressed the mens rea standard to consider a crime "violent" concerning the 16-level sentencing enhancement of 18 U.S.C. Appx. § 2L1.2(b)(1)(A)(ii). *Id.* at 974. The court noted that the 10th Circuit required purpose or intent, while the 3rd, 4th and 5th Circuits required recklessness. *Id.* at 976. The 8th Circuit agreed with the 3rd, 4th and 5th Circuits in finding that the 4th Circuit precedent was based on the Model Penal Code, which provides the "best generic federal definition." *Id.* at 977. Additionally, the 8th Circuit noted that the 10th Circuit has "questioned its holding . . . . [I]t is possible that at least some crimes with a recklessness element might be crimes of violence." *Id.* at 978 n.6 (internal citations omitted). Thus, the 8th Circuit concluded that recklessness constitutes "violent crime" allowing for a 16-level sentencing enhancement. *Id.* at 978.

Extradition – Speedy Trial Clause: *Martinez v. United States*, 793 F.3d 533 (6th Cir. 2015)

The 6th Circuit addressed whether a treaty with Mexico concerning extradition is subject to the Speedy Trial Clause of the Sixth Amendment of the United States Constitution. *Id*. at 544. The Court noted that the 11th Circuit determined that the "lapse of time" provision in the treaty did not invoke protection under the Speedy Trial Clause. *Id*. at 545. The Court disagreed with the 11th Circuit, relying on precedent and statutory interpretation, which encourages a more liberal interpretation of the treaty when provisions or terms are ambiguous. *Id*. at 547. Thus, the 6th Circuit concluded that the treaty allows a petitioner to invoke the Sixth Amendment if a certain amount of time has passed between a crime committed and the extradition request. *Id.* at 548.

Remedies – Calculation of Damages: *United States v. Martin*, 796 F.3d 1101 (9th Cir. 2015)

The 9th Circuit considered whether Application Note 3(F)(v) of the United States Sentencing Commission Guidelines Manual should be

applied to the use of fraud to secure minority-business certifications. *Id.* at 1110. The 7th Circuit "has held that the use of fraud to secure minority-business certifications fits . . . within the scheme considered by Application Note 3(F)(v)" of the United States Sentencing Commission Guidelines Manual. *Id*. (internal quotations omitted). "Application Note 3(F)(v) provides that where regulatory approval by a government agency is obtained by fraud, the loss shall include the amount paid for the property, services, or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services." *Id.* (internal quotation marks omitted). The 9th Circuit disagreed with the 7th Circuit's decision to apply the rule reasoning that "the rule of lenity counsels against an expansive interpretation of the application note, particularly where, as discussed below, another application note is a closer fit to these circumstances." *Id.*

Sentencing – Adjustments and Enhancements: *United States v. Cramer*, 777 F.3d 597 (2d Cir. 2015*)*

The 2nd Circuit addressed whether "[a]pplication Note 4 to [U.S. Sentencing Guidelines] section 2G1.3 [is] plainly inconsistent with [U.S. Sentencing Guidelines Manual § 2G.1.3(b)(3)(B)] and therefore inapplicable to that subsection." *Id.* at 600. The court noted that the 4th and 5th Circuits have held that the Application Note relates only to the minor-inducement subsection of the provision, and Application Note 4 was inconsistent with § 2G.1.3(b)(3)(B), while the 7th Circuit found that the enhancement did not apply in spite of its plain language. *Id.* at 604, 606. The 2nd Circuit agreed with the 4th and 5th Circuits that Application Note 4 is plainly inconsistent with § 2G.1.3(b)(3)(B). *Id.* at 606. The court reasoned that the language of § 2G.1.3(b)(3)(B) is clear, and there is "no indication that the drafters of the Guidelines intended to limit this plain language through Application Note 4." *Id.* Thus, the 2nd Circuit concluded "Application Note 4 does not preclude an enhancement under Guidelines section 2G1.3(b)(3)(B) when a defendant solicits third parties to engage in prohibited sexual conduct with a minor, even if neither the minor nor someone who exercises custody, care, or supervisory control over the minor is involved directly in the communication." *Id.* at 607.

STATUTORY INTERPRETATION

Choice of Law – U.S. Sentencing Guidelines Manual § 7B1.1(a)(1)(A)(i): *United States v. Willis*, 795 F.3d 986 (9th Cir. 2015)

The 9th Circuit addressed whether a court should use the applicable federal, state, or local offense or the defendant's conduct to determine

whether an uncharged offense constitutes a federal crime of violence. *Id.* at 993. The 2nd Circuit previously found that a determining what constitutes a crime of violence requires a court to compare the defendant's actual conduct to the federal definition of the crime. *Id.* The 3rd Circuit has held that "the categorical approach is necessarily not applicable in the revocation context." *Id.* at 993 n.5. The 9th Circuit disagreed with the 2nd and 3rd Circuits; instead, the 9th Circuit concluded that a court must identify the particular crime for which the defendant was responsible, and determine whether that crime, rather than the defendant's conduct, contains an element of force to determine if the crime was a crime of violence. *Id.* at 993.

Fraud – Defining 'Means of Identification' under 18 U.S.C. § 1028A: *United States v. Wilson*, 788 F.3d 1298 (11th Cir. 2015)

The 11th Circuit addressed "whether the use of someone's name and forged signature on a United States Treasury check sufficiently identifies a specific individual to qualify as a 'means of identification' under 18 U.S.C. §1028A." *Id*. at 1310. The court noted that the 9th Circuit determined that "a forged signature constitutes the use of that person's name and thus qualifies as a 'means of identification' under the statute[,]" while the 4th Circuit found that "a bare name alone was not sufficient to identify the specific individual as required under the statute[.]" *Id*. The 11th Circuit agreed with the 9th Circuit, finding that the plain language of the statute supports its position. *Id*. at 1310. The statute plainly defines 'means of identification' as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual." *Id*. at 1311. The 11th Circuit agreed with the 9th Circuit's position that "[b]y using the word any to qualify the term 'name,' the statute reflects Congress's intention to construct an expansive definition that includes a signature." *Id*. (internal quotation marks omitted). Thus, the 11th Circuit concluded that the use of names and forged signatures on refund checks, standing alone, qualifies as a means of identification under 18 U.S.C. §1028A. *Id*.

Mens Rea – Bank Fraud Act: *United States v. Shaw*, 781 F.3d 1130 (9th Cir. 2015)

The 9th Circuit addressed whether § 1344(1) of the Bank Fraud Act requires specific intent to defraud the bank itself. *Id*. at 1131. The court noted that the 2nd Circuit determined that the statute requires intent to specifically defraud the bank, while the 9th Circuit found that the statute only requires intent to harm any entity, regardless if the harm occurs to a specific person or a bank. *Id*. at 1136. The court disagreed with the 2nd

Circuit, reasoning that requiring specific intent would pose difficulty in prosecuting such crimes and because such an interpretation of the statute does not align with Congress' legislative intent. *Id*. Thus, the 9th Circuit concluded that the only intent required to violate the Bank Fraud Act is an intent to harm any entity. *Id.*

Natural Resources – Fish and Wildlife Protection: *United States v. Hughes*, 795 F.3d 800 (8th Cir. 2015)

The 8th Circuit addressed whether or not a price of guide services in excess of $350 conclusively establishes a felony violation of the Lacey Act. *Id.* at *8. The court noted that the 5th and 9th Circuits determined that evidence of the price guide services is relevant to the market value of the wildlife. *Id.* at *9–11. The 8th Circuit disagreed with the 5th, 9th, and 10th Circuits "[t]o the extent that [those circuits] hold that a price of guide services in excess of $350 conclusively establishes a felony violation." *Id.* at *11. The 8th Circuit stated that: "we believe that, in determining the market value of wildlife, the jury may consider evidence of the price of guide services." *Id.* The court further noted that it agrees "with the [5th] and [9th] Circuits that evidence of the price of guide services is *relevant* to the market value of the wildlife but "simply do not agree that it is always the *same* as the market value of the wildlife (or, for that matter, that it is always the *best* indication of the value of the game." *Id.* (internal quotation marks omitted). Thus, the 8th Circuit held that the jury may consider evidence of the price of guide services in determining the market value of wildlife. *Id.*

Standards of Review−Plain and Clear Error Review: *United States v. Barela*, 2015 U.S. App. LEXIS 14501 (10th Cir. Aug. 18, 2015)

The 10th Circuit addressed whether a condition imposed on an individual's supervised release that prohibited viewing, possessing, depicting, or describing sexually explicit conduct or pornography involved a greater deprivation of liberty than necessary, and thereby violated the First Amendment. *Id.* at *2. The 1st, 7th and 9th Circuits held that the similar ban on sexually stimulating material was plain error. *Id.* at *18. On the other hand, the 6th and 8th Circuits held that there was no error in imposing a condition banning pornography and erotica. *Id.* Here, the 10th Circuit found the case at bar was more consistent with the 6th and 8th Circuit cases. *Id.* at *18–19. Thus, the court held there is no demonstrative clear and obvious error because of the defendant's voracious history of pornography viewing. *Id.* at *19.